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No. 91-922

In The

Supreme Court of the United States

October Term, 1991

THE STROH BREWERY COMPANY,

Petitioner,

v.

DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of New Mexico

BRIEF IN OPPOSITION OF RESPONDENT DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

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QUESTION PRESENTED

The petition mischaracterizes the proceeding and holding below by presenting the judgment as grounded on the federal issue of retroactivity of United States Supreme Court decisions.

In *Stroh Brewery Company v. Director of the New Mexico Department of Alcoholic Beverage Control,* 816 P.2d 1090 (1991), the judgment to which petitioner directs this Court in this proceeding, the Supreme Court of New Mexico held that its ruling on a prior appeal that the price affirmation requirement of the 1979 New Mexico Discrimination in Selling Act was constitutional was the law of the case and that neither *James B. Beam Distilling Company v. Georgia,* 111 S.Ct. 2439 (1991) nor *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971) required it to except to that doctrine as a procedural bar and apply *Healy v. Beer Institute, Inc.,* 491 U.S. 324 (1989) (*"Healy II"*) to retroactively invalidate its earlier decision.

The question therefore presented here for review is:

Should this Court exercise its certiorari jurisdiction to review a state court judgment based on the adequate, independent and bona fide state ground of the procedural bar of the doctrine of law of the case in a civil action?

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Respondent, Director of the New Mexico Department of Alcoholic Beverage Control ("Director") hereby respectfully requests that this Court deny the petition of petitioner, The Stroh Brewery Company ("Stroh") filed with this Court December 12, 1991.

STATEMENT OF THE CASE

Director hereby incorporates by reference the Statement of the Case in the opinion below. Further, Director

adds the following to correct petitioner's Statement of the Case herein. As argued in Point I of this Brief in Opposition, the Supreme Court of New Mexico, in its opinion below, affirmed the judgment of the trial court on the central and primary basis that the New Mexico doctrine of law of the case, under the facts and circumstances of this litigation, was a procedural bar to re-examination and re-litigation of an issue decided by it on earlier appeal in 1983. Quotations from and citations to the New Mexico opinion are provided below (references to opinion in Petitioner's Appendix). Director submits that the petition generally ignores the real basis of the New Mexico decision and through misdirection attempts to create an impression of circumstances that do not exist in the record.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE DECISION BELOW IS ADEQUATELY AND INDEPENDENTLY SUPPORTED BY A BONA FIDE STATE GROUND

This Court should deny Stroh's petition for a writ of certiorari. The petition almost completely ignores that the Supreme Court of New Mexico's opinion was primarily based on a state issue, a procedural bar to further litigation, the doctrine of law of the case. This Court should not review state court judgments that are supported by bona fide, adequate and independent state grounds, even if federal questions are raised and resolved in the case.

Klinger v. Missouri, 13 Wall. 257, 263 (1871); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

Although the Supreme Court of New Mexico did discuss the issue of retroactivity and, using a *Chevron* (see *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)) analysis, resolve it in favor of respondents, it grounded its opinion on a state law issue, the New Mexico doctrine of law of the case. The court below was careful in outlining and highlighting the basis for its opinion. The majority stated:

> The parties advance the following arguments on appeal. Stroh argues that our holding in *United States Brewers Association* is not the law of the case and should not be applied as such in determining if Stroh is liable under the bond. Stroh argues that, following our holdings in *Reese v. State*, 106 N.M. 505, 506, 745 P.2d 1153, 1154 (1987), and *Moya v. Catholic Archdiocese*, 107 N.M. 245, 248, 755 P.2d 583, 586 (1988), the law of the case doctrine in New Mexico cannot be used "where the former appellate decision was clearly, palpably, or manifestly erroneous. . . ." (quoting *Reese*, 106 N.M. at 507, 745 P.2d at 1155.) Under the supremacy clause of the United States Constitution, Stroh argues, we must follow the mandate of *Healy II* in holding the 1979 law invalid, and thus absolve Stroh from any liability under the bond.

Pet. App. 7a.

> The Director counters by arguing that under the Supreme Court's recent holding in *American Trucking Association v. Smith*, 495 U.S. ___, 110 S.Ct. 2323, 110 L. Ed. 2nd 148 (1990), *Healy II* should not be given "retroactive effect." Consequently, the Director argues, our prior ruling on

> the 1979 law in *United States Brewer's Association* is the law of the case and must be given effect now, regardless of any subsequent invalidation of the 1979 law by *Healy II*. The Director also urges a different reading of New Mexico law of the case doctrine than that asserted by Stroh. By that doctrine, the Director argues, we correctly decided *United States Brewer's Association* based on *Seagram*, the applicable governing precedent at the time of our decision. Hence, our decision in the case, establishing the law of the case, was not "clearly, palpably or manifestly erroneous or unjust."

Pet. App. 7a, 8a.

> * * * Neither our decision in *United States Brewer's Association*, nor the trial court's ruling appealed in that case, were "clearly, palpably or manifestly erroneous," as the Supreme Court itself has only just held that *Seagram* is no longer good law. How could a decision based on the right law at that time now be a "manifestly erroneous" decision?

Pet. App. 13a.

> Further, neither our decision in *United States Brewer's Association*, nor the trial court's ruling appealed in that case, have produced an unjust result.

Pet. App. 13a.

* * *

> Therefore, under the law of this case, *Healy II* does not invalidate the 1979 law. As the trial court correctly ruled, the law of this case is that dictated by our holding in *United States Brewer's*

> *Association* and the underlying trial court decision appealed in that case. The recent case of *James B. Beam Distilling Company v. Georgia*, 59 U.S. L.W. 4735 (June 20, 1991), notwithstanding, which we find inapplicable, we affirm the judgment below on the *central issue* discussed above. (Emphasis supplied.)

Pet. App. 14a.

From these excerpts, it is clear that the parties framed and the court below analyzed the central issue as that of law of the case. Within that context, the court determined that it was not required to depart from its earlier decision and that, in fact, even a *Chevron* analysis was consistent with requiring it, on the basis of the equities involved, to apply the doctrine as a procedural bar to reversal. The majority opinion, therefore, after taking into account Stroh's arguments regarding retroactivity, affirmed the trial court on the "central issue" of law of the case.

Justice Franchini's concurring opinion elaborated on the inapplicability of *James B. Beam Distilling Company v. Georgia* ("*Beam*"), 111 S.Ct. 2439 (1991):

> * * * The matter before us today has been in litigation since 1979, and Stroh is subject to our decision in *United States Brewer's Association v. Director of N.M. Dept. of Alcoholic Beverage Control*, 100 N.M. 216, 668 P.2d 1093 (1983), *appeal dismissed sub nom, United States Brewer's Association v. Rodriguez*, 465 U.S. 1093 (1984), which we find to be controlling here as the law of the case. Application of the law of the case doctrine in this matter places this case squarely in the

> context of those cases beyond the narrow scope of the *Beam* decision.

Pet. App. 16a.

There may therefore have been no real need to undertake the *Chevron* retroactivity analysis (except to avoid the certainty that failure to address the retroactivity issue would have fueled Stroh's efforts in this Court), because the court below affirmed the trial court on the "central issue" of law of the case, purely a state law issue. However, as noted above, the court below took care in distinguishing its law of the case holding from *Chevron* and *Beam*, allowing this court to view the state and federal issues as independent.

Early law of the case doctrine in New Mexico was a procedural bar as inviolable as and similar to res judicata, forbidding a change in law decided on a prior appeal, whether the earlier decision was right or wrong. *Sanchez v. Torrez*, 38 N.M. 556, 37 P.2d 805 (1934). Recent decisions have relaxed that rigid structure somewhat by allowing reexamination of the same issue on a later appeal in extremely limited circumstances when, among other things, not to do so would be "manifestly unjust" and the first decision was "manifestly erroneous". *Reese v. State*, 106 N.M. 505, 745 P.2d 1153 (1987); *Moya v. Catholic Archdiocese*, 107 N.M. 245, 755 P.2d 583 (1988).

In the proceedings below, as noted above, Stroh urged the Supreme Court of New Mexico to find that its earlier decision in *United States Brewer's Association v. Director, N.M. Dept. of Alcoholic Beverage Control*, 100 N.M. 216, 688 P.2d 1093 (1983); *appeal dismissed sub nom, U.S.B.A. v. Rodriguez*, 465 U.S. 1093 (1984) ("*U.S.B.A.*"),

was "manifestly erroneous," in light of *Brown-Forman Distiller's Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986) and *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989) ("*Brown-Forman*" and "*Healy II*," respectively). This the court refused to do, holding that its reliance on *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966) ("*Seagram*") made its earlier decision supportable and therefore not "manifestly erroneous" and further that to reverse its earlier decision would be unjust to the state and other parties. Pet. App. 12a, 13a. For this Court to hold that the New Mexico court's analysis of what is and what is not "manifestly erroneous" under New Mexico law of the case doctrine or to determine what other aspects of the doctrine may or may not have been correctly applied, including balancing of the equities involved, would be an inappropriate exercise of certiorari jurisdiction.

Director recognizes that a state judgment based on the law of the case doctrine may not always prevent this Court's review of a previously decided federal issue. See, *Hathorn v. Lovorn*, 457 U.S. 255 (1982). In *Hathorn*, however, the federal issue was not raised in the first appeal, but later by rehearing petition and that petition was denied without comment. *Hathorn*, 457 U.S. at 258, 259. As a result, Justice O'Connor saw the first decision as not "final" and not therefore sufficient to "prevent us from reviewing federal questions determined in the first appeal." *Hathorn*, 457 U.S. at 262. The Court went on to determine that both Mississippi Supreme Court opinions were incorrect.

Hathorn is in sharp contrast to the case at bar. Here, there is no question that the Supreme Court of New Mexico finally decided the federal question in the first

appeal in 1983. *U.S.B.A.*, 688 P.2d 1093 (1983). At the time, based on *Seagram*, the decision was correct, which this Court recognized in dismissing the federal appeal in 1984. *U.S.B.A.*, 465 U.S. 1093. In *Hathorn*, there was no issue of an attempted retroactive application of new law to an established decision. *Hathorn* was a situation in continuing flux. The case now before the Court is one in which the liability question has been settled for nearly seven years. As such, the New Mexico decision, based on the law of the case, under *Hathorn* rests on adequate and independent state grounds.

This is also not a case, as Stroh proposes, with consequences beyond its own limited reach. In fact, at the heart of this case is only the question of Stroh's liability in money damages under preliminary injunction and supersedeas bonds posted in the underlying state court litigation. The New Mexico legislature in 1985 repealed the state statute which offended Stroh. To respondent Director's knowledge, this situation is singular in the United States. There are no other litigants in similar circumstances.

The essence of this case has been settled for years. Stroh's monetary liability (excluding interest) on its bonds was set in the period June 15, 1979 through February 21, 1985. Pet. App. 5a. On February 21, 1985, the decision in the first state court appeal was the law of the case and *Seagram* was still "good law." All that remained to be done, and all that was later done by the trial court, was to fix the exact amount of Stroh's liability on the bonds, pursuant to the mandate of the court below. The question of the constitutionality of the price discrimination legislation had been finally decided by the Supreme

Court of New Mexico and Stroh's appeal from that decision dismissed by this Court for want of a substantial federal question in 1984. *U.S.B.A.*, 465 U.S. 1093. The case, except for remedial proceedings relating to damages, was closed.

Stroh's bonds and the preliminary injunction in the underlying litigation conditioned Stroh's obligation to pay damages on a final decision that the 1979 law was valid. Pet. App. 2a, 3a, 34a, 35a. The court below determined that it had made such a final decision in the first state court appeal in 1983. In making that determination, the court below necessarily interpreted and construed the bond's language regarding "finality" to allow it to hold that its earlier decision determining liability on appeal was the law of the case and therefore a "final" result.

There is no suggestion in Stroh's petition that the New Mexico law of the case doctrine as a procedural bar is inadequate on the basis that it is not "strictly or regularly followed." See, *Barr v. City of Columbia*, 378 U.S. 146 (1964). To the contrary, the language of *Reese* and *Moya*, supra, indicate precisely the opposite, that the doctrine in New Mexico is faithfully invoked – and excepted to only when exceptional circumstances exist. This Court therefore has no cause to look behind the lower court's judgment with the concern that the doctrine was arbitrarily invoked in an attempt to avoid this Court's rulings in *Healy II* or *Beam*.

If this Court now assumes jurisdiction over this matter by granting Stroh's petition, it would review a narrow state court judgment based on New Mexico law of the case doctrine and involving interpretation of a contract

(the bonds). As such, the Court would be reviewing matters of state law. To grant Stroh its requested relief would mean dictating to the Supreme Court of New Mexico how, when and why it may use its state law of the case doctrine as a procedural bar to repetitive litigation and how it should interpret contracts. To do so under the circumstances of this case would not be an appropriate exercise of this Court's certiorari jurisdiction.

II

THE SUPREME COURT OF NEW MEXICO DID NOT ERRONEOUSLY RULE ON A SUBSTANTIAL FEDERAL QUESTION

A. Neither *Chevron* nor *Beam* Mandates Retroactive Application of *Healy II* Under the Facts of this Case

This Court has seen this case before. In 1984, the Court dismissed an appeal by the then-appellants, United States Brewers Association and others, including Stroh, for "want of a substantial federal question." *U.S.B.A.*, 465 U.S. 1093. Stroh is the only brewer party left in this litigation and now asks this Court, in light of *Healy II* and *Beam*, to reopen the federal question issue and grant relief notwithstanding the Court's 1984 ruling on appeal.

In determining that *Healy II* should not be applied retroactively to invalidate its earlier decision, the court below used a *Chevron* analysis and also found *Beam* to be inapplicable. Pet. App. 12a, 13a, 14a. The court did this, even though it affirmed the trial court's judgment on the central state issue of law of the case, as set forth above in Point I. Its decision on both grounds was correct.

Under *Beam*, a self-described "narrow" holding, there is nothing to prevent a state court from applying its own "procedural bars" to prevent retroactive application of new law to existing precedent. *Beam*, 111 S.Ct. at 2448. The Supreme Court of New Mexico did exactly that in refusing to except to its law of the case doctrine and did not, therefore, apply *Healy II* retroactively. It further found that the language of *Healy II*, with respect to *Seagram* "no longer" being good law (*Healy II*, 109 S.Ct. at 2502) was prospective rather than retroactive, that it would be inequitable to reexamine its earlier decision and, last, that a *Chevron* analysis compelled a holding of non-retroactivity.

Significantly, this Court remarked in *Healy II* that its decision in *Brown-Forman* was in part grounded upon "20 years of experience with the affirmation laws that proliferated after *Seagram*." *Healy II*, 109 S.Ct. at 2502. This analysis supports the Supreme Court of New Mexico's holding below that its earlier decision on appeal was not "manifestly erroneous." It further bolsters our argument that there are no retroactive aspects or implications raised in *Healy II* as to the overruling of *Seagram*, and that therefore under either a *Beam* or *Chevron* analysis, a retroactive application of the case is not appropriate.

The first state court appeal in this case upheld the constitutionality, based on *Seagram*, of a "retrospective" price affirmation statute. It was on that holding this Court dismissed the first appeal and also on that holding that the court below based its law of the case reasoning. Further, the final judgment below which Stroh asks this Court to review and reverse is grounded only on the same "retrospective" 1979 law providing a "continuing

basis" for Stroh's liability (Pet. App. 6a, 14a), not the "contemporaneous" type of statute found in *Healy II*.

In *Healy II*, although this Court overruled *Seagram* (a case also upholding the constitutionality of a "retrospective" price affirmation law), a "retrospective" law was not actually before this court. A "contemporaneous" law was. *Healy II*, 109 S.Ct. at 2499. Therefore, this Court's ruling as to *Seagram* in *Healy II* had to be prospective in nature, as neither the parties nor the issues at bar in *Healy II* were directly concerned with retrospective price affirmation and this Court therefore neither could have afforded nor did it afford relief on that basis.

So, the *Healy II* court overruled *Seagram* "in the interest of . . . avoiding further litigation on the subject of liquor price affirmation," not to afford relief to the parties then at bar. *Healy II*, 109 S.Ct. at 2502. The Court did not apply and could not have applied the overruling of *Seagram* in *Healy II* to the litigants before it and there would be no offense now to principle in not applying *Healy II* retroactively in this matter, the sort of problem which concerned the *Beam* court in its analysis of "modified, selective, prospectivity." *Beam*, 111 S.Ct. at 2444.

B. The Equities in this Matter Have Been Litigated and Found Not to Favor Stroh.

Under both its law of the case and *Chevron* analyses, the court below found the equities did not favor Stroh. *Beam* (as well as *Chevron*) allows "consideration of individual equities when deciding remedial issues in particular cases." *Beam*, 111 S.Ct. at 2448.

The equities in this case do not favor Stroh, as the Supreme Court of New Mexico expressly found. To allow Stroh, as the only supplier of brewed products to New Mexico wholesalers during the years 1979 to 1985, to neither comply with the law nor its obligations on its bonds, would be unjust to other settling brewer parties, wholesalers and the state. So the New Mexico court found. Pet. App. 12a, 13a. Stroh's predecessor and other brewers filed this action in 1979 for injunctive and declaratory relief. The law whose effects they sought to avoid has been off the books since 1985. Pet. App. 5a. In 1985, *Seagram* was still good law. Not until 1989, four years after the law's repeal, did the *Healy II* Court, in another action involving declaratory and injunctive relief, overrule *Seagram*.

It would be inequitable to the state, other settling brewers and respondent-wholesalers to apply *Healy II* retroactively under any analysis, given the history of this litigation, the state's reliance on *Seagram* and the purely prospective change in the law of price affirmation (vis-a-vis *Seagram*) which *Healy II* created.

Stroh suggests in its petition that this Court should overrule *Chevron* (which notably *Beam* did not do) in favor of a rule of automatic, all-encompassing retroactivity. Director submits that if this Court revisits *Chevron* and *Beam* in the future, any change in retroactivity jurisprudence should be away from the inflexible approach suggested in *Beam* and toward a methodology that recognizes the need for equitable analysis in individual cases, discussed by Justice O'Connor in *Beam*. Legislative action which attempts to change the past is not the norm, nor should similar judicial action be. To be sure, in certain

cases, this Court must step in to insure that past wrongs are rectified, but those cases should be few and selected because of individual factors favoring such relief. *Chevron* and the New Mexico law of the case doctrine recognize these principles and this is not such a case.

C. This Court May Follow Its Own Law of the Case Doctrine and Deny Stroh's Petition.

In addition to federal questions raised below and correctly decided, another reason why this Court should deny Stroh's petition is found in its own law of the case doctrine.

Since this Court dismissed the original appeal in this case in 1984, there have been only two significant developments with respect to the litigation. In the first, the trial court determined the amount of Stroh's liability on the bonds, a determination the Supreme Court of New Mexico affirmed on appeal. The second is the change in this Court's jurisprudence in the area of liquor price affirmation brought about by *Brown-Forman* and *Healy II*, a change which the court below held did not mandate re-examination of its 1983 decision holding the New Mexico price discrimination legislation constitutional under *Seagram*.

Under these circumstances and, given the procedural posture of this case, this Court may employ its own law of the case doctrine, having once dismissed the appeal of this case for lack of a substantial federal question. Grounded in precepts similar to New Mexico's, this doctrine empowers the Supreme Court to prevent repetitive litigation of the same issues and to settle the parties'

expectations in final decisions. *Tyler v. McGuire*, 17 Wall. 253 (1873); *Clark v. Keith*, 106 U.S. 464 (1883).

Although these earlier holdings were modified and expanded by later cases, including *Messinger v. Anderson*, 225 U.S. 436 (1912), this Court still retains the doctrine of the law of the case, a procedural bar to Stroh's petition, and based upon that doctrine, the Court may deny the relief Stroh requests.

CONCLUSION

The Court should not grant Stroh's petition. The New Mexico judgment is supported by adequate and independent state grounds. The New Mexico court's resolution of the federal retroactivity issues is proper, under *Chevron* or *Beam*, and collateral to the holding on the state doctrine of law of the case. Litigated equitable factors bear against Stroh and in favor of respondents. There are no far-reaching implications to this litigation's outcome. This Court has determined once before that no substantial federal question exists in this matter and that is the law of this case in this Court. There is no good reason, in fact or in law, for this Court to grant Stroh's petition.

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